Filed 11/29/16 City of Selma v. City of Kingsburg CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF SELMA,

Plaintiff and Appellant,

v.

CITY OF KINGSBURG,

Defendant and Respondent.

F072632

(Super. Ct. Nos. 12CECG03223 and 13CECG02139)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Costanzo & Associates and Neal E. Costanzo for Plaintiff and Appellant.

Kahn, Soares & Conway, Rissa A. Stuart and Michael J. Noland for Defendant and Respondent.

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INTRODUCTION

Respondent City of Kingsburg (Kingsburg) sought and obtained costs for preparing the administrative records as the prevailing party in two actions brought by appellant City of Selma (Selma) under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.). Selma appeals the trial court's denial of its motion to strike or tax those costs.

We conclude Selma has failed to show Kingsburg's memoranda of costs were untimely filed. We also determine the trial court did not abuse its discretion in concluding Selma failed to properly object to costs claimed by Kingsburg. Finally, we conclude the issue of costs as to one of the two CEQA actions is moot. Consequently, we affirm the trial court's denial of Selma's motion.

FACTS[1]

Annexation Action

On October 5, 2012, Selma filed a petition for writ of mandate against Kingsburg, initiating Fresno Superior Court case No. 12CECG03223. The petition was brought under CEQA and sought to invalidate certain actions Kingsburg had taken to annex land in Fresno County. We will refer to that case as the "Annexation Action."

On June 21, 2013, the parties stipulated that "the annexation is subject to the approval, or disapproval of a second agency, the Fresno County Local Agency Formation Commission [LAFCo]." Because that decision was still pending before LAFCo, the parties agreed to continue the deadline for preparing the administrative record (see Pub. Resources Code, § 21167.6) until 30 days after LAFCo approved or disapproved the annexation.

NKSP Action

On July 5, 2013, Selma filed a petition for writ of mandate against Kingsburg, initiating Fresno Superior Court case No. 13CECG02139. That petition, also brought under CEQA, sought to invalidate Kingsburg's repeal of a portion of the North

[1]The court was unable to locate the reporter's transcript filed in this case. On its own motion, the court has taken judicial notice of the reporter's transcript in *City of Selma v. Fresno County Local Agency Formation Commission*, F072712 (app. pending) and informed the parties of its intent to rely on that transcript in the present appeal. (See Evid. Code, §§ 452, subd. (d), 459.) The parties were afforded an opportunity to object. (See Evid. Code, §§ 455, 459.)

Kingsburg Specific Plan[2] (NKSP) and the underlying determination that the repeal was exempt from CEQA. We will refer to that case as the "NKSP Action."

Cost Estimates

On October 9, 2013, Kingsburg's counsel transmitted two letters to Selma's counsel providing estimates of the cost of preparing the administrative records in the Annexation and NKSP Actions.[3]

The October 9, 2013, cost estimate for the Annexation Action identified the following line items:

"The estimated total page count is: 3,000 x 3 "Total estimated cost per page .25 p/p	$	2,250.00
"Engineer Time organizing records 8 hours at $90.00/h	$	540.00 [*sic*]
"City Staff 6 hours @ $22.50/h	$	135.00
"Staff time organizing/indexing 5 hours at $150.00/h	$	750.00

[2]"'The Legislature has required every county and city to adopt "a comprehensive, long-term general plan for the physical development of the county or city.…" (Gov. Code, § 65300.) A general plan provides a "'charter for future development'" and sets forth a city or county's fundamental policy decisions about such development.' [Citation.]" (*San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 508.) A city is also empowered to prepare "specific plans" to systematically implement the general plan "for all or part of the area covered by the general plan." (Gov. Code, § 65450.)

[3]The cost estimate letters were attached to a declaration filed by Kingsburg's counsel in opposition to Selma's motion to strike/tax costs that is the subject of the present appeal. Both letters indicate that a draft index for the administrative records was included with the letter. However, the cost estimate pertaining to the Annexation Action attached to counsel's declaration does not contain a draft index. The fax cover sheet for the cost estimate transmission indicates 18 pages were sent, as does the fax confirmation sheet. The cost estimate letter itself was only two pages long. In contrast, the draft index for the NKSP Action is included with its cost estimate.

Based in part on this purported omission, Selma contends Kingsburg failed to comply with The Superior Court of Fresno County, Local Rules, rule 2.11. However, Selma does not cite authority establishing that a violation of local rules warrants the granting of a motion to strike or tax costs. Consequently, we reject the contention.

"Cost for Audio tapes of meetings	$	50.00
"Cost for CDS for parties (2) and 2 for court	$	100.00
"Staff time at KS&C for scan/bate stamp, OCR (make PDF searchable) copying and binding 20 hours at $100/h	$	2,000.00
"Cost for Spiral binding the records	$	2,000.00
"**Total Estimate**	**$**	**7,825.00**"

The October 9, 2013, cost estimate for the NKSP Action identified the following line items:

"The estimated total page count is: 189 x 3 "Total estimated cost per page .25 p/p	$	141.75
"Time Engineer/staff spent organizing is 2 hours at a rate of $85/hr	$	170.00
"Cost for Audio tapes of meetings	$	50.00
"Cost for CDS for parties (2) and 2 for court @ $25 each	$	100.00
"Staff time at KS&C for scan/bate stamp, OCR (make PDF searchable) and print copying and binding (2 hours @ $100/hr[)]	$	200.00
"Cost for Spiral binding the records (1 spiral for 300 pages or less)	$	50.00
"**Total Estimate**	**$**	**711.75**

On October 30, 2013, Kingsburg's counsel transmitted amended cost estimates to Selma's counsel. The amended cost estimate for the Annexation Action contained the following line items:

"The total page count is: 3,103 x 3 (court, plus 2 copies) Total cost ($.25 p/p)	$	2,327.25

"Engineer Time organizing records 8 hours at $90.00/h	$	540.00 [*sic*]
"City Staff 6 hours @ $22.50/h	$	135.00
"Attorney Time Indexing (4 hours at $250)	$	1,000.00
"Cost for duplicating audio recordings of meetings	$	50.00
"Cost for electronic copy of record for parties 2; and 2 for court	$	100.00
"Staff time at KS&C for index/scan/bate stamp, OCR (make PDF searchable) copying and binding 32 hours at $100/h	$	3,200.00
"Cost for Spiral binding the records (3,103 pgs/300 per volume = 11 volumes)	$	22.77
"**Total Cost**	**$**	**7,375.02**"

An index of documents for the Annexation Action record was also included in the October 30, 2013, transmission.

The amended October 30, 2013, cost estimate for the NKSP Action identified the following line items:

"The total page count is: 189 x 3 (court, plus 2 copies) Total cost ($ .25 p/p)	$	141.75
"City Engineer — organization of records – 2 hours at a rate of $90/hr	$	180.00
"Cost for CDs for parties (2); and 2 for court @ $25 each	$	100.00
"Attorney Time — Indexing (1 hour at $250/hr)	$	250.00
"Staff time at KS&C for scan/bate stamp, OCR (make PDF searchable) and print copying		

and binding (6 hours @$100/hr)	$	600.00
	$	
"Cost for Spiral binding the records (1 spiral for 300 pages or less)	$	6.79
"**Total Cost**	**$**	**1,278.54**"

An index of documents for the administrative record in the NKSP Action was included in the October 30, 2013, transmission.

In November 2013, Selma agreed to pay $1,000 towards the preparation of the administrative record in the Annexation Action, and $500 towards the preparation of the administrative record in the NKSP Action.

Trial Court Proceedings

The superior court consolidated the Annexation and NKSP actions for oral argument only. After oral argument, the superior court issued two minute orders on December 16, 2014: one in the NKSP Action and one in the Annexation Action. The minute orders each contained the following text:

> "Matter previously taken under advisement, the Court now rules: The petition for writ of mandate is denied. The petition for mandamus denied. City of Kingsburg is directed to submit directly to this Court, a Proposed judgment of dismissal."

The minute orders also said, "See attached copy of Order signed and issued." The orders attached to each minute order were identical and indicated the petitions in the Annexation and NKSP actions were denied and explained the court's reasoning on certain claims raised in the cases. The attached orders stated near the end, "The petitions for mandamus are denied. The City of Kingsburg is directed to submit directly to this Court, a proposed judgment of dismissal." The attached orders concluded, "IT IS SO ORDERED," were dated December 16, 2014, and were signed by Judge Hamilton.

On December 16, 2014, a deputy court clerk mailed the minute orders and attachments to counsel for Selma and Kingsburg. The mailing was evidenced by a document signed by the deputy clerk entitled "Clerk's Certificate of Mailing."

On January 9, 2015, the trial court received Kingsburg's proposed "judgments"[4] denying the writ petitions in each case. Selma made written objections to the proposed judgments on January 15, 2015.[5] On January 21, 2015, Kingsburg filed written responses to Selma's objections.

On February 13, 2015, before the proposed judgments submitted by Kingsburg had been signed, Selma filed notices of appeal in the Annexation and NKSP actions.

On February 24, 2015, the court filed signed[6] judgments in each case. The judgments were entitled, "[PROPOSED] JUDGMENT DENYING PETITION FOR WRIT OF MANDATE," and the word "[PROPOSED]" had been blacked out. The judgments contained the following identical language in the body:

> "This matter came on regularly for hearing on November 7, 2014, in Department 402 of this court, located at 1130 O Street, Fresno, California. Attorney Neal Costanzo appeared on behalf of … City of Selma, and attorneys Rissa A. Stuart and Lauren Noland of Kahn, Soares & Conway, LLP, appeared on behalf of … City of Kingsburg.
>
> "The Court having reviewed the record of [City of Kingsburg]'s Proceedings in this matter, the briefs submitted by counsel, the arguments of counsel; the matter having been submitted for Decision; and the Court having issued an Order on December 16, 2014, that the Petition for Writ is denied in this proceeding, and Judgment should be entered, IT IS ORDERED THAT:

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[4]One of the central issues in this case is whether these documents were, in fact, judgments. Our reference to them as judgments here in our recitation of the facts is merely a reflection that they purported to be judgments. Below, we will resolve the issue of whether they constitute legal judgments for purposes of the issues raised in this appeal.

[5]We are unable to determine from the quality of the documents in the appellate record whether these written objections were file-stamped by the superior court. However, Kingsburg acknowledges in its briefing that "Selma objected to the proposed Judgments on January 15, 2013 [*sic*]."

[6]The judgments were "signed" with a stamp of Judge Hamilton's name. A register of actions appearing in the Appellant's Appendix indicates the February 24, 2015, judgment was "signed by Judge Cabrera" even though the stamped name on the judgment is Judge Hamilton's name.

"1. Judgment be entered in favor of [City of Kingsburg] in this proceeding.

"2. The Petition for Writ of Mandate is denied in its entirety.

"3. [City of Kingsburg] is awarded costs of suit herein."

The judgments are dated February 24, 2015, and are stamped with Judge Hamilton's name.[7]

On March 5, 2015, Kingsburg filed a "Notice of Entry of Judgment Denying Petition for Writ of Mandate" in each case. Kingsburg served these notices on Selma's counsel on March 3, 2015.

Memoranda of Costs and Motion to Strike/Tax Costs

A memorandum of costs for each case is in the appellate record. We are unable to discern any file stamp on either memorandum, though the handwritten date of March 10, 2015, appears next to the signature block on both documents. Selma's briefing indicates Kingsburg's memoranda were "presumably filed … on March 10, 2015."[8] The proofs of service indicate each memorandum was served on opposing counsel by mail on March 10, 2015.

In its memoranda of costs, Kingsburg sought $778.54 for preparing the administrative record in the NKSP Action and $6,375 for preparing the administrative record in the Annexation Action.[9]

On June 30, 2015, Selma filed a motion to strike Kingsburg's memoranda of costs or, alternatively, to tax costs. The motion to strike was "made on the ground that the Memorandum of Costs was not filed within 20 days of the Clerk's mailing of a copy of the final judgment and, as a result, Kingsburg has waived the right to claim costs. (CRC

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[7] See footnote 6, *ante*.

[8] A register of actions included in the appellate record contains an entry reading: "03/10/2015 Memorandum of costs filed."

[9] Selma acknowledged that Kingsburg properly deducted its November 2013 payments of $500 in the NKSP Action and $1,000 in the Annexation Action.

Rule 3.1700)." The motion to tax costs was based on Selma's claim that the administrative record "includes a vast number of irrelevant documents so that the time spent preparing those records was not a necessary and reasonable cost …." Kingsburg opposed the motion.

The superior court denied Selma's motion, finding the memoranda of costs were timely filed and Selma failed to meet its burden of "properly objecting" to the costs sought by Kingsburg.

Selma now appeals from the order denying its motion to strike or tax costs.

After briefing was completed in the present appeal, this court reversed the underlying judgment in the NKSP Action.[10] (See *City of Selma v. City of Kingsburg*, *supra*, F071156.)

DISCUSSION

I. Selma Has Failed to Show Kingsburg's Memoranda of Costs Were Untimely Filed

A. Standard of Review

"'The trial court's exercise of discretion in granting or denying a motion to tax costs will not be disturbed if substantial evidence supports its decision.' [Citation.] To the extent the statute grants the court discretion in allowing or denying costs or in determining amounts, we reverse only if there has been a '"clear abuse of discretion" and a "miscarriage of justice."' [Citation.] Interpreting a statute is, of course, a matter of law, which we review de novo. [Citation.]" (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52.)

B. Cost Recovery in CEQA Actions

The prevailing party in a CEQA action may recover costs of record preparation. (*Coalition for Adequate Review v. City and County of San Francisco* (2014) 229

[10] In the same opinion, this court affirmed the underlying judgment in the Annexation Action. (See *City of Selma v. City of Kingsburg* (Jul. 14, 2016, F071156) [nonpub. opn.].)

Cal.App.4th 1043, 1058; *Wagner Farms, Inc. v. Modesto Irrigation Dist.* (2006) 145 Cal.App.4th 765, 774; see Code Civ. Proc.,[11] § 1032, subd. (b).) "'Prevailing party' includes … a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant."[12] (§ 1032, subd. (a)(4).)

To claim costs, the prevailing party "must serve and file a memorandum of costs within 15 days after the date of service of the notice of entry of judgment or dismissal by the clerk under … section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after the entry of judgment, whichever is first." (Cal. Rules of Court, rule 3.1700(a)(1) (rule 3.1700).)[13]

C. Issue Presented

Selma contends Kingsburg's memoranda of costs were untimely under rule 3.1700(a)(1). Specifically, Selma argues the 15-day deadline in rule 3.1700(a)(1) began to run on December 16, 2014, when the superior court clerk mailed to counsel the minute orders denying the writ petitions. Kingsburg contends the time began to run in March 2015[14] when Kingsburg itself served notices of entry of judgment on Selma.

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[11]Undesignated statutory references are to the Code of Civil Procedure.

[12]Section 1094.5, subdivision (a) provides that in administrative mandamus actions the "the cost of preparing the record shall be borne by the petitioner." However, if the petitioner prevails in the action, it may recover the cost of preparing the record. (*Ibid.* ["If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs."].)

[13]Section 1032 and rule 3.1700 govern the recovery of costs by a prevailing party in CEQA actions. (See *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1151-1154 [considering § 1032 and Cal. Rules of Court, former rule 870].) California Rules of Court, former rule 870 became rule 3.1700 without substantive change. (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 879, fn. 9.)

[14]Kingsburg incorrectly asserts that "Notices of Entry of Judgment in both matters were served by mail on March 5, 2015." The record reflects the notices were actually served on March 3, 2015.

The dispositive issue presented is whether the clerk's December 16, 2014, mailing was a "notice of entry of judgment or dismissal by the clerk under … section 664.5." (Rule 3.1700(a)(1).) If it was, then the 15-day clock began to run on that date and Kingsburg's memoranda were filed too late. If not, the 15-day clock began to run on March 3, 2015, and memoranda of costs filed and served on March 10, 2015 would not have been late.

First, we must determine whether, as Selma contends, the court's December 16, 2014, orders constituted "judgments." This is a necessary premise to Selma's theory because it is axiomatic that there can be no effective notice of entry of judgment when, in fact, no judgment has been entered. Consequently, if the December 16, 2014, order is not a judgment, then its mailing by the clerk on the same day cannot constitute a "notice of entry of judgment" under rule 3.1700(a)(1).[15]

"A judgment is the final determination of the rights of the parties in an action or proceeding." (§ 577.) Under section 664.5, "'judgment' includes any judgment, decree, or signed order *from which an appeal lies*." (§ 664.5, subd. (c), italics added.)

"'[A] paper filed in an action does not become a judgment merely because it is so entitled; it is a judgment only if it satisfies the criteria of a judgment.…' [Citations.]" (*Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 224.) """It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that *where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final*, but where anything further in the nature of judicial action on the part of the court is essential to a final

[15]Because we conclude, *post*, the December 16, 2014, orders were not judgments under section 664.5 or rule 3.1700, we need not decide whether the clerk's mailing of the orders constituted a "notice of entry" under cases like *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, cited by Selma.

determination of the rights of the parties, the decree is interlocutory.”’” (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5.)

D. Analysis

The December 16, 2014, orders clearly resolve the issues raised by the pleadings. The orders plainly state, “The petitions for writ of mandate are denied” and conclude with, “IT IS SO ORDERED.” In this respect, the December 16, 2014, orders seem to be a “final determination of the rights of the parties in an action or proceeding.” (§ 577.)

However, the orders also direct Kingsburg to submit a proposed judgment to the court. This directive necessarily contemplates further judicial action—i.e., signing the proposed judgment. As noted above, the Supreme Court has observed that “‘“‘where anything further in the nature of judicial action on the part of the court is *essential* to a final determination of the rights of the parties, the decree is interlocutory.” (*Dana Point Safe Harbor Collective v. Superior Court*, *supra*, 51 Cal.4th at p. 5, italics added.) If this were an issue of first impression, we might hold that signing a judgment merely reiterating a prior order is not “essential” to a final determination of the rights of the parties. However, long-standing decisional law points to the opposite conclusion when the earlier order contemplated execution of a future judgment.

“No appeal lies from a minute order …, the clear intent of which is that the court has merely authorized the issuance of another written order or judgment.” (*Kindig v. Palos Verdes Homes Assn.* (1939) 33 Cal.App.2d 349, 354-355; cf. *Herrscher v. Herrscher* (1953) 41 Cal.2d 300, 304.) When a minute order directs a party to “‘prepare judgment accordingly,’” it constitutes “a mere preliminary entry authorizing the subsequent judgment.” (*Davis v. Taliaferro* (1963) 218 Cal.App.2d 120, 122, italics omitted.) Such an order does not “finally dispose of the matter” and is not a “final appealable order.” (*Id.* at pp. 122-123.) Here, the December 16, 2014, orders do clearly indicate the trial court was “authoriz[ing] the issuance of another written order or judgment.” (*Kindig*, *supra*, at pp. 354-355.) Based on the cases cited above, we

conclude the December 16, 2014, orders—which clearly contemplated execution of a "judgment" in the future—were not appealable. Since they were not appealable, they do not constitute judgments under section 664.5, and no effective notice of entry of judgment could have been predicated thereon.

In this way, the case is distinguishable from *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579 (*Laraway*), relied on by Selma. In *Laraway*, the petitioner filed a petition for writ of mandamus and prohibition, and for injunctive and declaratory relief. (*Id*. at pp. 580-581.) On August 23, 2000, the trial court entered an order denying the petition. (*Id.* at p. 581.) The order "did not contemplate nor direct the preparation of any further order or judgment." (*Id.* at p. 582.) On January 29, 2001, a judgment was filed which "simply reiterated that the court had 'ruled by Order dated August 23, 2000' on the petition, set forth the same rulings as contained in the order denying the petition, added a provision that judgment was entered in favor of respondent and against petitioner, and awarded respondent $0 in costs against petitioner." (*Ibid*.) The petitioner filed a notice of appeal from the January 29, 2001, judgment, and the respondent cross-appealed from the same judgment. (*Ibid*.)

The *Laraway* court held the August 23, 2000, order was appealable. (*Laraway*, *supra*, 98 Cal.App.4th at p. 583.) Selma argues that, under *Laraway*, the December 16, 2014, orders in this case were similarly appealable. However, we conclude *Laraway* is distinguishable. Though the August 23, 2000, order in *Laraway* is similar to the December 16, 2014, orders in this case, there is one dispositive difference. The order in *Laraway* "did not contemplate nor direct the preparation of any further order or judgment." (*Laraway*, *supra*, at p. 582.) And this fact was central to *Laraway*'s holding:

> "The August 23, 2000 order was an appealable order: *it contemplated no further action, such as the preparation of another order or judgment* (see, e.g., *Davis v. Taliaferro*[, *supra*,] 218 Cal.App. 2d 120, 122-123), and disposed of all issues between all parties. [Citations.] As an order denying a petition, it was properly treated as a final judgment. [Citations.]" (*Laraway*, *supra*, 98 Cal.App.4th at p. 583, italics added.)

Here, the December 16, 2014, orders *did* contemplate further action: the preparation and signing of a judgment.

Selma responds that the directive for Kingsburg to submit a proposed judgment was "superfluous." In light of the cases cited above, we cannot agree.[16]

II. The Trial Court Did Not Abuse Its Discretion When It Ruled Selma Failed to Properly Object to Kingsburg's Memorandum of Costs in the Annexation Action

A. Standard of Review

"To the extent the statute grants the court discretion in allowing or denying costs or in determining amounts, we reverse only if there has been a '"clear abuse of discretion" and a "miscarriage of justice."' [Citation.]" (*Chaaban v. Wet Seal, Inc.*, *supra*, 203 Cal.App.4th at p. 52.)

B. Motions to Strike or Tax Costs

The opposing party may move to strike or tax costs by serving and filing a motion within 15 days after service of the cost memorandum. (Rule 3.1700(b)(1).) "Unless objection is made to the entire cost memorandum, the motion to strike or tax costs must … state why the item is objectionable." (Rule 3.1700(b)(2).)

"'[A] "verified memorandum of costs is prima facie evidence of [the] propriety" of the items listed on it, and the burden is on the party challenging these costs to demonstrate that they were not reasonable or necessary.'" (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 989.) But if items in the cost memorandum are "'properly objected to, … the burden of proof is on the party claiming them as costs.' [Citation]" (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1266.)

[16]Because we conclude the December 16, 2014, orders were not appealable, we do not address Kingsburg's alternative contention that the trial court had discretion to award costs notwithstanding any failure to comply with the time limit of rule 3.1700(a)(1).

C. Analysis

In its motion to tax, Selma argued that documents contained in volumes V through XI of the administrative record contained irrelevant and unnecessary documents, including the Fresno County General Plan[17] and several documents from prior LAFCo proceedings concerning "sphere of influence" (see Gov. Code, § 56076) determinations.

The trial court ruled that Selma did not properly object to Kingsburg's cost memoranda and, therefore, the burden did not shift to Kingsburg to justify the costs. First, the court stated, "'Properly objected' to means that statements in points and authorities and declaration of counsel are insufficient to rebut the prima facie showing. (*Jones v. Dumrichob*[, *supra,*]63 Cal.App.4th [at page] 1266.)" Selma takes issue with this statement of law. We agree that this statement, in isolation, is overly broad because points raised in a memorandum of points and authorities can sometimes rebut the prima facie showing of a cost memorandum. (See *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624.)

But the trial court's issue with Selma's challenge went beyond the vehicle by which it was presented. The trial court went on to rule:

> "Although City of Selma seeks to strike all the costs because it alleges that the documents contained in Volumes V through XI [of the administrative record] are not necessary, Selma did not inform the court how many pages were in those volumes."

The court concluded that "[n]o burden shifts until this Court has a true 'costs-per-page' amount for the record as prepared without first subtracting the unknown number of pages in Volumes V through XI."

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[17]The mitigated negative declaration (MND) expressly incorporated the Fresno County General Plan by reference. The Fresno County General Plan is also listed as a "Reference" at the conclusion of the MND. CEQA requires that the "[MND] … and all documents … cited or relied on in the findings" must be included in the administrative record. (Pub. Resources Code, § 21167.6, subd. (e) & (e)(9).) The Fresno County General Plan was properly included in the administrative record.

We find no abuse of discretion in the court's ruling on this issue. Selma was claiming that some, but not all, of the documents included in the administrative record were improper. Yet, it did not inform the court how many pages of the record it was contending were improperly included. Even if the trial court had agreed those documents were wrongly included, it could not easily determine how much to tax costs. "It is not the lower court's duty to search through voluminous material to find support for [a party's] request, just as it is not an appellate court's duty to search through a record to find support for allegations in an appellate brief." (*Seaman v. Superior Court* (1987) 193 Cal.App.3d 1279, 1290.) Since Selma did not adequately object to Kingsburg's claimed costs, the burden did not shift to Kingsburg to justify the inclusion of the documents.

III. There Is No Award of Costs in Effect in the NKSP Action, and Selma's Contentions Concerning Costs in that Case Are Moot

As noted above, this court reversed the judgment in the NKSP Action after briefing was completed in this case.[18] (See *City of Selma v. City of Kingsburg*, *supra*,

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[18]We requested the parties submit supplemental briefs on this issue. In its supplemental brief, Kingsburg raises two main points.

Kingsburg notes that in our opinion reversing the NKSP action, we noted "Each party shall bear its own costs on appeal." (*City of Selma v. City of Kingsburg*, *supra*, F071156.) Kingsburg argues this language shows Selma "was not awarded costs in the NKSP Matter as a prevailing party." Appellate costs and trial court costs are different. Appellate costs concern costs incurred pursuant to appellate proceedings. (See, e.g., Cal. Rules of Court, rule 8.278(d).) Trial court costs concern costs incurred pursuant to trial court proceedings. (See § 1033.5.) Our direction that each party would bear its own *appellate* costs does not impact the issue of costs recovered in the trial court, such as the cost of preparing the administrative record.

Kingsburg also argues that its cost award was ordered "in compliance with the Public Resource[s] Code, not because Kingsburg was the prevailing party …." Kingsburg contends Selma is required to pay for the costs of preparing the administrative record in the NKSP Action "as a matter of law" pursuant to Public Resources Code section 21167.6, subdivision (b)(1). But, as relevant here, that statute merely provides, "The *parties* shall pay any reasonable costs or fees imposed for the preparation of the record of proceedings *in conformance with any law or rule of court*." (Pub. Resources Code, § 21167.6, subd. (b)(1), italics added.) In essence, this statute simply "'leads us to the general rules applicable to the award of costs, which are set forth in … sections 1032, 1033, and 1033.5.'" (*St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 161 Cal.App.4th 989, 1013.) An award of costs under those statutes turns on whether a party is the "prevailing party." Similarly, while section 1094.5, subdivision (a) provides that "the cost of preparing the record shall be borne by the petitioner," it also

F071156.) That reversal automatically "operate[d] to vacate the award" of costs. (*Evans v. Southern Pacific Transportation Co., supra,* 213 Cal.App.3d at p. 1388.)[19] Because the award of costs in the NKSP Action is no longer in place, Selma's current appellate challenge to the trial court's ruling on the motion to strike and/or tax is moot.[20]

DISPOSITION

The trial court's order denying Selma's motion to strike or tax costs is affirmed. Each party to bear its own costs on appeal.

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PEÑA, J.

WE CONCUR:

_____
KANE, Acting P.J.

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DETJEN, J.

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observes that "[i]f the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs." (*Ibid*.) Thus, while the petitioner may initially bear the cost of preparing the record in an administrative mandamus action, it may recover those costs if it prevails. Under either statute, the award of costs was incident to the judgment because it turned on the identity of the prevailing party. Consequently, this court's prior reversal of that judgment automatically "operate[d] to vacate the award" of costs. (*Evans v. Southern Pacific Transportation Co.* (1989) 213 Cal.App.3d 1378, 1388.)

[19]Selma's supplemental brief argues the cost award in the NKSP Action "must be reversed." However, we are merely observing that our prior reversal of the underlying judgment *already* operated to vacate the award of costs.

[20]The matter of costs in the NKSP Action is currently "at large" (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053) and may be resolved when and if a party seeks costs after the trial court enters judgment in accordance with our opinion in that case.